No. [illegible]

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

DANIEL D. GLASSER,

Petitioner,

vs.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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PRESS OF JUDD & DETWEILER, INC., WASHINGTON, D. C.

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CITATIONS

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Daniel D. Glasser, petitioner, prays that a writ of certiorari be issued to review the decree of the United States Circuit Court of Appeals for the Seventh Circuit, entered in the above cause on December 13, 1940, affirming the judgment of the United States District Court for the Northern District of Illinois.

Opinions Below.

The trial court filed no opinion. The opinion of the Circuit Court of Appeals (R. 1117-1139) is reported in 116 F. (2d) 690.

Jurisdiction.

The judgment of the Circuit Court of Appeals sought to be reviewed was entered on December 13, 1940 (R. 1139-1140). Petitioner filed a petition for rehearing which was denied on January 23, 1941 (R. 1239). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of the Criminal Appeals Rules, promulgated by this Court May 7, 1934.

Questions Presented.

1. Whether the appointment by a trial court of the previously retained counsel of one defendant (petitioner herein) to act as well as counsel for a co-defendant whose defense involves adverse and conflicting interests does not plainly violate the right of the defendant under the Sixth Amendment to have effective assistance of counsel, particularly where it appears that such appointment was made over defendant's objections on this ground and in fact resulted in plain prejudice to defendant.

2. Whether the trial court did not abuse its discretion in overruling an uncontradicted and undenied affidavit in support of motion for a new trial which stated: (1) That the jury commissioner and clerk with respect to approximately one-half of the names placed in the jury box had unlawfully delegated to a private society their exclusive duty to make up the jury list; (2) that said list so made up totally and systematically excluded all other persons otherwise qualified who were not members of said society; (3) that only those members of said private society who had attended its jury classes and been lectured on the views of the prosecution were placed on the jury list from which the petit jury was picked; and (4) that as a result thereof a

jury was picked which was biased, prejudiced and previously instructed.

3. Whether a defendant may properly be tried and sentenced for an infamous crime in the absence of a showing that an indictment has been returned by a grand jury in open court.

4. Whether the grossly unfair action and conduct of the trial judge at the trial did not deprive the defendant of a fair trial and of the benefit of the presumption of innocence.

5. Whether the misconduct of the prosecuting attorney, permitted and condoned by the trial judge, was such a deviation from the usual trial procedure and so prejudicial to the defendant as to have deprived him of a fair and impartial trail;

6. Whether the total lack of evidence of guilt of petitioner did not require reversal of the judgment;

7. Whether the alleged indictment upon which petitioner was tried: (a) Charged any violation of the laws of the United States, or (b) was sufficiently definite and certain to inform petitioner of the charge.

8. Whether the jury commissioners were not required to follow the statute of Illinois with reference to the qualification of jurors at the time of the selection of the grand jury.

Statutes Involved.

The statutes involved are:

U. S. C., Title 18, sec. 88 (Criminal Code, sec. 37).
U. S. C., Title 18, sec. 91 (Criminal Code, sec. 39).
U. S. C., Title 28, sec. 411 (Judicial Code, sec. 275).
U. S. C., Title 28, sec. 412 (Judicial Code, sec. 276).
Illinois Rev. Stats., pp. 1908, 1913.

They appear in the appendix, pp. 53-54.

Statement of the Case.

The petitioner, Daniel D. Glasser, was an Assistant United States Attorney for the Northern District of Illinois from March 13, 1935, until June 23, 1939 (R. 186-187). He was in charge of prosecution of all liquor violation cases at Chicago from June, 1935, to April, 1939. In the course of this work, he handled almost one-fourth of all the cases in that office in which there were 18 Assistant United States Attorneys (R. 1038).

Unfortunately, particularly for Glasser, there arose a sharp diversity as to policy between the office of the District Attorney and the local Alcohol Tax Unit. The former, in accordance with the thought of at least one of the district judges (R. 719) and the announced policy of the Department of Justice [1] sought to strike at the roots and convict responsible individuals rather than their agents and other petty violators (R. 895-896, 897). In some instances, this diversity of policy caused the District Attorney's office to make independent investigations on its own behalf. As a result, there was constant friction and two-thirds of the agents of the Chicago Alcohol Tax Unit were transferred elsewhere (R. 898-899, 905). Finally, in the trial of a minor bootlegger for transportation, it appeared that information as to major wholesale vendors available to the Alcohol Tax Unit had been by it withheld from the office of the District Attorney (R. 719, 898). The Alcohol Tax Unit representatives, called for explanation by Judge Barnes, asserted that an incompetent agent had made a poor investigation report as to the major violators and therefore the report had not been transmitted to the District Attorney. In the course of this explanation, however, it appeared that the agent who had ven-

[1] Department of Justice Circular No. 2743 to all United States Attorneys, dated August 28, 1935 (Orig. Ex. 199, R. 913).

tured to make this investigation and report had been discharged (R. 720).

Later, the April, 1937, grand jury [2] required the appearance of Yellowley, District Supervisor of the Alcohol Tax Unit (R. 946). After his appearance and before the discharge of the grand jury, Yellowley solicited the foreman thereof to come to his hotel room. This resulted in contempt proceedings against Yellowley by the District Attorney, handled by petitioner (R. 1031). The answer of Yellowley admitted the impropriety of his acts and that the conference related solely to the inquiry then being made by the grand jury.[3] (R. 1032-1034). It is not denied that, subsequently, Yellowley threatened him with the statement (R. 948):

> Mr. Glasser, I will get you if it is the last thing I ever do.

Thereafter, on December 9, 1938, agents under Yellowley arrested one Paul Svec, who was then appealing from a two-year sentence on a conviction obtained by Glasser. He was taken to their office, there furnished with petitioner's unlisted phone number and told to call petitioner and have him guarantee to the agents payment of money to them (R. 584-585, 932-933). This attempt at entrapment failed and was fully disclosed by the prompt action of Glasser in secreting an agent of the Federal Bureau of Investigation in his office where the agent overheard a conversation with Svec in which the latter confessed and said (R. 565):

> The agents told me they would let me go if I did this telephoning. (See R. 583-585, 932-935).

Svec further stated that he had never before tried to fix his cases (R. 566, 584). This conversation, curiously

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[2] This jury made a report emphatic in its criticism of the policy and conduct of the Alcohol Tax Unit above referred to (R. 789-795). Offer of proof of this report was denied (R. 795).

[3] Offer of proof of this petition and answer was denied (R. 1031-1034).

enough, is set forth in the indictment as overt act No. 22 (R. 19).

Shortly after the appointment of the new District Attorney, Glasser, among a number of other assistants, resigned.[4]

Petitioner, with four others, was tried on an indictment, filed September 29, 1939, containing two counts, the first of which was dismissed (R. 38, 715). The second, in substance, charged the petitioner and others with conspiracy to defraud the United States of the conscientious services of an Assistant United States Attorney by promising, offering, causing and procuring to be promised and offered, money and other things of value to an officer of the United States with the intent to influence his decision and action on certain cases which were at times brought before him in his official capacity (R. 22, 28).

At the time of the discharge of the grand jury, September 29, 1939, there was no record of the return of any indictment against this petitioner. Motion to quash on this ground was denied (R. 42).

On the day of the selection of the jury, in spite of objection by petitioner, made personally and by his counsel that his interests were adverse (R. 180-181), the court appointed the attorney who had been theretofore retained by petitioner and was representing him alone, to act also as counsel for co-defendant Kretske (R. 183).

The underlying theory of the Government's case is very vague (R. 154-155, 160). As stated by the District Attorney, it was that "there was a conspiracy on foot to solicit certain persons to make promises" (R. 154).

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[4] At this time the District Attorney, W. J. Campbell, paid high tribute to the record of Glasser, saying "Mr. Glasser has the best records of convictions of anyone in this office and his record in alcohol cases is the best in the country. Since I have been in office, he has prosecuted ninety-nine cases and lost only one. He hasn't lost a jury case in three and one-half years." Chicago American, September 29, 1939.

The proof by the Government attempted merely to show that money for the purported corruption of petitioner or others (third persons) had been paid by accused persons to certain of petitioner's co-defendants for the promised "fixing" of their cases. In addition, the Government showed merely that as to some of these accused persons the United States Commissioner dismissed, or the grand jury voted no-bills. However, neither the United States Commissioner nor any grand juror—nor, indeed, any other person—testified to any unfaithful conduct on the part of the petitioner. See Point 6 below wherein these matters are set forth briefly.

Nevertheless, all of the defendants were found guilty. Petitioner filed a motion for new trial and in arrest of judgment (R. 1046) supported by an uncontradicted affidavit to the effect that by reason of total and systematic exclusion of persons otherwise qualified, he did not have a trial by jury free from bias, prejudice and prior instruction (R. 1049-1051). This motion was denied and exceptions were noted (R. 103). Petitioner was sentenced to confinement in the penitentiary for fourteen months (R. 1068).

The Circuit Court of Appeals affirmed (R. 1139-1140). An analysis of the gross misconceptions of the court below as to the facts of record is set forth in chart form hereinafter at page 33.

Specification of Errors to be Urged.

The Circuit Court of Appeals erred:

1. In failing to hold that the appointment by the trial court of petitioner's counsel to act as well as counsel for a co-defendant having conflicting interests substantially impaired the constitutional rights of the petitioner to have effective assistance of counsel and to due process of law.

2. In holding that the trial court did not abuse its discretion in denying petitioner's motion for new trial based on an uncontradicted affidavit affirmatively showing and offering to prove illegal and prejudicial composition of the trial jury.

3. In holding that the record shows that the indictment was returned into open court by a grand jury.

4. In holding that the acts and conduct of the trial judge did not deprive the petitioner of the benefit of the presumption of innocence and the right to a fair trial.

5. In holding that the misconduct of the prosecuting attorney, permitted and condoned by the trial judge, did not require reversal of the judgment.

6. In failing to hold that there was no evidence in the record to support the judgment and that therefore reversal of the judgment was required.

7. In failing to hold that the indictment was insufficient in law because it is vague, indefinite, and fails to charge a violation of law which may properly be made the basis of a conspiracy count against such an officer.

8. In failing to hold that the jury commissioner and the clerk of the district court violated the laws of the State of Illinois and of the United States with reference to the selection of the grand jury.[5]

Reasons for Granting the Writ.

1. *Petitioner, by action of the trial court and through no fault of his own, was deprived of effective assistance of counsel and of due process of law in violation of the Fifth and Sixth Amendments.*—The Circuit Court of Appeals has

[5] For purposes of brevity, this specification is not argued in this petition. If certiorari is granted, however, it will be urged in the brief of petitioner.

sanctioned a departure from the accepted and usual course of judicial proceedings by the district court involving an important question of federal law not yet settled by this Court.

The record shows that, as a result of the action of the court in appointing his counsel to act as counsel for another co-defendant, petitioner was deprived of the full and effective assistance counsel would otherwise have afforded him. This action of the court was assigned as error by the petitioner (Assg't No. 8, R. 116). The Circuit Court of Appeals merely held the appointment was not "such an error as to warrant reversal" (R. 1131).

This deprivation by the trial court prevented petitioner from adequately safeguarding his right to exclude incompetent evidence and from fully exercising his right to cross-examine the witnesses for the prosecution. The error was highly prejudicial and required reversal.

Some time before his trial, Glasser had retained as his attorney William Scott Stewart, an eminent member of the local bar. On the day set for trial, counsel for petitioner's co-defendant, Kretske, filed a motion for continuance (R. 173). This motion was denied and another attorney was appointed for Kretske. The following day this was vacated (R. 96-97). Thereupon, the court asked whether there was any reason why petitioner's attorney could not represent Kretske (R. 180). Mr. Stewart immediately stated that there was inconsistency in the defense of petitioner and Kretske. He made specific reference to the affidavit earlier filed in support of petitioner's motion for severance in which those inconsistencies had been pointed out (R. 180, 171). Petitioner further emphatically voiced the same objection in person, stating that he wished that he have exclusive representation by his lawyer (R. 181). Despite these objections, the court appointed Stewart to represent Kretske as well

(R.97). Having set out the objections, Stewart could do no more, and he accepted this appointment only upon insistence of the court (R.180, 181, 183) and thereafter represented petitioner and his co-defendant, Kretske, throughout the trial.

The only evidence presented against petitioner (legally inadmissible but allowed to go to the jury without objection) consisted of testimony by third persons as to conversations with third parties in which they agreed to pay money to Kretske or others for the alleged purpose of obtaining favorable consideration from petitioner—in which conversations Kretske was alleged to have said that the money, or part of it, would be paid over to petitioner. (Kretske denied participation in any of these conversations (R. 799).) This testimony (regardless of weight) was competent and not subject to objection as against Kretske. As against petitioner, however, its incompetency is apparent unless and until a conspiracy was shown. No such conspiracy was ever shown. Nevertheless, no objection on behalf of petitioner was made to the testimony by Stewart. His reason for refraining from objection necessarily must have been a desire to protect Kretske. Had objection been made on behalf of petitioner alone and not of Kretske, the jury would probably have thought that Kretske was admitting the truth of the testimony; on the other hand, the same type of limited objections might have prejudiced petitioner upon inference by the jury that petitioner, who was not present at the conversation, was contesting their verity. The absence of any objection necessarily led the jury to regard the evidence as of equal materiality and weight against petitioner as against Kretske.

One example will suffice to show the substantial injury to petitioner. William Brantman testified that he paid $3,000 to Kretske (R. 652). Brantman testified that he did not know petitioner (R. 656). Plainly, the interests of

petitioner dictated a cross-examination by which to emphasize that in this transaction there was no mention or other basis for inference that petitioner was in any way connected with it. Faced with this dilemma resulting from the conflicting interests of his two clients, the attorney Stewart requested and was allowed a postponement of cross-examination (R. 663). After considering the matter for three days, Brantman then being recalled, Stewart declined to cross-examine—apparently having determined to avoid probable prejudice to Kretske (R. 711).[6] The damaging effect of the failure to cross-examine this witness is sustained by the comment of the court itself before sentence (R. 1061-1062).

When regard is had to the liberal rules of evidence which so largely favor the prosecution in conspiracy cases, the action of the trial court in forcing petitioner to forego the benefit of undivided assistance of counsel unhampered by regard for the interests of other defendants, plainly left him with little or none of the substance of the right to effective assistance of counsel intended to be safeguarded by the Sixth Amendment. As a consequence, the court in this case lost jurisdiction and the judgment of conviction is void. *Powell* v. *Alabama*, 287 U. S. 45, 59, 67, 68; *Johnson* v. *Zerbst*, 304 U. S. 458, 467-468. Wherever asserted, the fundamental right to assistance of counsel has been held to include the right to such assistance untrammelled and unimpaired by the representation of conflicting or adverse interests. *People* v. *Bopp*, 279 Ill. 184, 191-192; *People* v. *Rose*, 348 Ill. 214, 218; *People* v. *Rocco*, 209 Cal. 68, 73. Indeed, the necessity for protection of this fundamental right in cases such as this has been recognized by the Solicitor General of the United States. In his motion (p. 6) to dis-

[6] "A lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose." Canon of Professional Ethics No. 6.

miss in this Court in *Anderson* v. *Treat*, 172 U. S. 24, he said:

> "It is unnecessary for me to emphasize the propriety of Judge Hughes' action in insisting that Anderson, upon an issue of life or death, should have his own counsel of standing and ability, not embarrassed by employment of any others concerned in the transactions * * *."

Obviously, petitioner has here been denied a fundamental right.

2. *The jury was packed by the illegal delegation of their duties by the clerk and the jury commissioner, which violated the petitioner's right to an impartial trial and deprived him of his liberty without due process of law.*—In support of his motion for a new trial (R. 103) Glasser filed an affidavit (R. 101, 1049-1051) stating that all of the names of females placed in the jury box from which the petit jury in this cause was drawn were "presented to the clerk of the court * * * who is one of the jury commissioners, by the Illinois League of Women Voters, which list had previously been prepared by said league of women voters from their membership" (R. 1050). In holding that the trial court did not abuse its discretion in denying petitioner's motion for new trial (R. 1139) the Circuit Court of Appeals gave its sanction to these proceedings in the trial court which were so arbitrary as to deprive him of liberty without due process and of his right to trial by an impartial jury.

The affidavit clearly shows that approximately one-half the names placed in the jury box (i. e. the names of all females placed therein) were selected not by the clerk or jury commissioner as required by Federal statute, but by a private, unauthorized person. The selection involved a systematic exclusion of all except a restricted class in a single

social-study organization and deprived petitioner of his right to a fair trial.

This fundamental flaw in the manner of selection of the petit jury is shown by the affidavit to have been presented at the earliest moment the facts became known to petitioner (R. 1050-1051) by motions for new trial and in arrest of judgment (R. 1046) Cf. *Albizu* v. *United States,* 88 F. (2d) 138, 141; *Ogden* v. *United States,* 112 Fed. 523, 524, 526; *Hyman* v. *Eames,* 41 Fed. 676, 678; *Wilson* v. *Clement,* 126 Fed. 808, 810. The affidavit offers to prove the allegations therein contained (R. 1051). Since the allegations were in no way controverted either by counter-affidavits or even by a formal denial of the grounds assigned, they were to be accepted as true for the purpose of the motion. *Neal* v. *Delaware,* 103 U. S. 370, 395-396; *Ogden* v. *United States, supra,* 526-527; cf. *United States* v. *Chaires,* 40 Fed. 820, 823.

By statute, the jurors were required to have the same qualifications as jurors of the highest court of the state. Judicial Code, sec. 275, 28 U. S. C. sec. 411 (Appendix, p. 54). At least 300 names are required to be placed in the jury box from which a venire is drawn; and those names are required to be selected by the clerk and a jury commissioner. Judicial Code, sec. 276, 28 U. S. C. sec. 412 (Appendix, p. 54); *United States* v. *Murphy,* 224 Fed. 554, 562.

The affidavit states that of the 100-person venire 47 were female and 53 were male. This indicates that the clerk conformed to the requirement under Illinois law that the names of males and females be placed in the jury box without regard to sex. Ill. Rev. Stat. (1939), c. 78, sec. 1 (Appendix, p. 54); *People ex rel Denny* v. *Traeger,* 372 Ill. 11, 18. Since it is shown that the names of all females were presented by the Illinois League of Women Voters, it follows that, as to approximately one-half of the names placed in the jury box, selection was made not by the clerk or the jury commissioner but by a single unauthorized private organization.

The trial court was without power to dispense with the statutory requirement that selection be exclusively by the clerk and the jury commissioner, since it is an essential feature of the system prescribed by law and designed to secure and preserve the right to a fair and impartial trial. The decision of the Circuit Court of Appeals holding that the District Court did not abuse its discretion in denying a new trial conflicts in principle with the decisions in *Dunn* v. *United States*, 238 Fed. 508, 512 (C. C. A. 5); *United States* v. *Murphy, supra*, 224 Fed. 554, 560, 561, 566 (N. D. N. Y.); *In re Petition for Special Grand Jury*, 50 F. 2d 973 (M. D. Pa.); *Klemmer* v. *Railroad*, 163 Pa. 521, 530; *State* v. *Newhouse*, 29 La. Ann. 824, 825; *State* v. *Jenkins*, 32 Kan. 477, 479. Where the jury has been selected by persons having no authority whatever to select them, the whole proceeding to form the panel is void and the objection may be taken at any time. See *United States* v. *Gale*, 109 U. S. 65, 69; *Rodriguez* v. *United States*, 198 U. S. 156, 164. The error here is not a mere irregularity as to manner of selection; cf. *Agnew* v. *United States*, 165 U. S. 36, 42-45; *United States* v. *Brookman*, 1 F. (2d) 528, 536-538 (D. Minn.), aff'd 8 F. (2d) 803 (C. C. A. 8); *Wilson* v. *United States*, 104 F. (2d) 81, 82 (C. C. A. 5); neither does it involve a mere solicitation by the clerk of information from varied sources preliminary to selection by the clerk; cf. *Walker* v. *United States*, 93 F. (2d) 383, cert. denied 303 U. S. 644.

Even were the delegation of authority by the clerk to be deemed but a defect or imperfection in matter of form within the meaning of R. S., sec. 1025, 18 U. S. C. sec. 556, cf. *Williams* v. *United States*, 275 Fed. 129, 132 (C. C. A. 9), the affidavit in support of petitioner's motion obviates operation of that section. For it not only concludes that there was resultant prejudice but affirmatively states the facts showing bias, i. e., that all the women whose

names were presented "had attended jury classes whose lecturers presented the views of the prosecution" (R. 1050-1051). Indeed, it would seem that prejudice is necessarily implied by the showing that the jury was packed in that approximately half of the jury list names were selected, not by the clerk or jury commissioners, but by a private organization. "It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community." *Smith* v. *Texas* (U. S. Sup. Ct., Nov. 25, 1940), 85 L. ed. 106, 108.

It seems equally plain that the action of the clerk in effectuating a systematic exclusion from the jury list of all females save members of the jury classes of the Illinois League of Women Voters constituted an administration of the law so arbitrary as to violate the petitioner's right to due process under the Fifth Amendment. The opinion of the Circuit Court of Appeals after stating that the contentions here made were considered and overruled by the trial court held: "Under such circumstances we cannot say that the District Court had abused the discretion vested in it by law" (R. 1139). In so holding, the court plainly refused to exercise its function as a reviewing court, for it was required to consider the facts and the applicable statute. This court has set up, and we submit that the court below in reviewing the question of abuse of discretion was required to apply a definite test: Whether the denial of a new trial was in the exercise of a sound discretion "exercised not arbitrarily or wilfully, but with regard to what is right and equitable under the circumstances and the law, and directed by the reason and conscience of the judge to a just result". *Langnes* v. *Green*, 282 U. S. 531, 541; *Burns* v. *United States*, 287 U. S. 216, 222-223.

3. *The record fails to disclose that there was an indictment returned against this petitioner by any grand jury*

in open court or otherwise.—The petitioner, with the other defendants, by a motion to quash, supported by affidavit, raised the point that the alleged indictment had not been properly returned in open court and was filed without the proper order of the court directing that it be received and filed (R. 142, 149). The motion of the prosecutor to strike was sustained (R. 150, 42).

On appeal, the Circuit Court of Appeals acknowleged that (R. 1119):

> "• • • it must be made to appear from the record that the grand jury appeared in open court and returned into court the indictment to which the defendment is required to plead."

This rule is well recognized. *Ledbetter* v. *United States,* 108 Fed. 52, 55 (C. C. A. 5); *Reniga*r v. *United States,* 172 Fed. 646 (C. C. A. 4) and authorities cited; *Angle* v. *United States,* 172 Fed. 658; *Rainey* v. *The People,* 8 Ill. (3 Gil.) 71, 72; *Yundt* v. *The People,* 65 Ill. 372, 373. The rule is an obvious essential to the underlying purpose of the constitutional requirement of indictment by a grand jury—protection of the citizen against unfounded accusation whether it come from government or be prompted by partisan passion or private enmity. *Ex parte Bain,* 121 U. S. 1, 11; Charge to Grand Jury, Fed. Cas. No. 18,255 at p. 993. The Circuit Court of Appeals held, however, that the record satisfied this requirement.

The only record upon which the court could have relied was a surreptitious, anonymous, and unauthorized entry which may not properly be deemed part of the record. No question is raised as to the validity of the endorsement by the clerk: "Filed in open court this 29th day of September, A. D. 1939, Hoyt King, Clerk" or as to the preceding notation "A true bill," "George A. Hancock, Fore-

man" (R. 38). These, however, are manifestly insufficient to satisfy the requirement that the record show a "return" of the indictment by the grand jury. *Ledbetter* v. *United States,* 108 Fed. 52, 55; *Renigar* v. *United States,* 172 Fed. 646; *Shinn* v. *State,* 93 Ark. 290, 293.

The only indication of a "return" is the entry on the motion slip in the term subsequent to its signing by the court (R. 39). Petitioner, by an examination of the record, ascertained that there was no showing whatsoever of a return of an indictment by a grand jury. At the time of his examination the motion slip initialed by the court, "JHW" (James H. Wilkerson), contained a single entry: "Order discharging Grand Jury of Sept. Term 1939." Petitioner's motion to quash was filed October 31, 1939 (R. 40); but, under Rule 6 of the district court, the motion was required to be served on the United States Attorney not later than 4:00 P. M. of the prior day, October 30. At the argument on the motion on November 7, 1939, the motion slip above referred to was found to bear the added entry: "The Grand Jury return 4 Indictments in open Court. *Added 10/30/39*" (Emphasis ours) (R. 39).

This entry was made by some unknown person without notice to defendants or order of court. Aside from the fact that this entry identifies none of the indictments returned, it is notable that by a strange coincidence the date of this entry is the last day on which the notice of motion and motion could be served on the United States Attorney.

This entry was not made during the term of court at which the clerk's endorsement purports to show that an indictment was filed, Sept. 29, 1939. A new term of court had commenced on October 2, 1939, the first Monday of the month. Judicial Code, sec. 79, 28 U. S. C. sec. 152. The ap-

plicable rule is stated in *Ledbetter* v. *United States,* 108 Fed. 52, 55:

> It seems to be well settled that the record must show that the indictment was returned into court by the grand jury either by a minute entry to that effect or by indorsement of the fact upon the indictment itself, and that an omission will be fatal. See authorities cited in volume 10, Am. & Eng. Enc. Law, pp. 410, 411. It may be noticed that a defective record may be cured by proper entry ordered by the court during the term, or, if not called to the attention of the court during the term, then by proper order entered nunc pro tunc at a subsequent term. The minute entry with regard to the return of the indictment (claimed to apply) in this case is as follows: "November 21, 1899. The grand jury came into court, and returned 52 bills of indictment, each of which was indorsed 'A true bill,' and signed by Jas. W. Powell as foreman." The file mark of the clerk on the indictment was as follows: "Filed in open court this 21st day of November, 1899. J. W. Dimmick, Clerk." Neither this minute entry, nor the file mark, nor the two together, was sufficient to identify the indictment as properly returned into the district court by the grand jury, and this seems to be a plain error on the face of the record • • •

The fatal defect here is that at the new term no order *nunc pro tunc* was entered by the court. Without such an order the addition, whether by the clerk or any other person, was entirely lacking in significance. The requirement, as stated in 1 Bishop, Criminal Proceedings, sec. 1160, is approved by this Court in *Wight,* Petitioner, 134 U. S. 136, 143-144:

> When the term of the court has closed, it is too late to undo, at a subsequent term, what was done at a former term. A judgment of the court, for instance, cannot then be opened, and modified or set aside. Neither, it has been held, can the clerk, at a subsequent

> term, make an entry of what truly transpired at the preceding term. But this refers to the power of the *clerk*, proceeding of his own motion. The *court* may order *nunc pro tunc* entries, as they are called, made to supply some omission in the entry of what was done at the preceding term; yet this is a power the extent of which is limited, and not easily defined • • •

It is unnecessary here to determine whether an order *nunc pro tunc* for the entry in question could be entered. It is enough that an order is required. For, clearly, none was entered by the court in the instant case.

The very abuse here mentioned was checked by the declaration of the King in Britton, Ancient Pleas of the Crown (circa 13 Edw. I) quoted in the *Wight* case, *supra*. As paraphrased in 3 Bl. Comm., p. 409, the declaration in effect provided:

> that a record surreptitiously or erroneously made up, to stifle or pervert the truth, should not be a sanction for error; and that a record, originally made up according to the truth of the case, should not afterwards by any private rasure or amendment be altered to any sinister purpose.

Since there is no valid entry made at the term of the September grand jury to show that an indictment of the defendants was then returned, it is submitted that this error is fatal to the proceeding and requires reversal of the judgment.

4. *Improper conduct of the prosecuting attorney clearly violated the right of petitioner to a fair and impartial trial.* That the prosecutor in any case has much to do with the manner and conduct of the trial, and that he can influence the atmosphere of a trial, is clear. That there is burden upon the district attorney as a quasi-judicial officer to aid and maintain the proper judicial atmosphere, and in

doing so to prosecute the defendant solely on the facts of the case by legitimate methods, is well recognized.

Improper questions, statements not based upon evidence, and browbeating of witnesses, is forbidden. All these are prohibited because they tend to distract the minds of the jurors from the actual facts and real issues and create against the defendant a prejudice born of the fact that the district attorney is recognized as a public officer, who has apparently no personal interest in the case, and who is at heart an altruist and interested solely in obtaining justice.

A few of the multitude of instances of misconduct by the prosecuting attorney which destroyed all semblance of a fair trial in this case may be briefly set forth:

(1) During the cross-examination of the petitioner he was questioned as to a few of the thousands of cases handled by him. The files relating thereto had already been put in evidence by the government. Without authorization by the court, these exhibits were kept in the possession of the prosecutor who, although ordered to show them to petitioner during a weekend recess, refused to do so on the ground that petitioner was not accompanied by his attorney (R. 980, 982-983).

In the first place the ordinary safeguarding of the interests of parties litigant requires that exhibits once submitted in evidence be retained in the possession of the clerk of the court.[7] In any event it is clear that a defendant has an unqualified right to examine such exhibits. Here the denial of such right to petitioner forced him to state in truth, but with naturally prejudicial effect on the jury, that he did not remember the various cases referred to

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[7] Rule 16 of the District Court for the Northern District of Illinois provides: "After being marked for identification, models, diagrams, exhibits and material forming part of the evidence in any cause pending or tried in this court, shall be placed in the custody of the clerk unless otherwise ordered by the court.

by the prosecuting attorney. The violation of the rule of court also culminated here in the very loss against which it sought to guard. The exhibits were taken by the Government from the courtroom on the day the verdict was returned and retained for five or six months until demanded by the clerk of the Circuit Court of Appeals (R. 1094, 1096). Although the Government stated that all the exhibits admitted in evidence at the trial had been transmitted to the clerk of the Circuit Court of Appeals (R. 1096), petitioner showed, and the Government finally admitted, that certain exhibits (Nos. 198, 205, 206 and 208) were missing (R. 1098, 1100).

Two of these missing exhibits, Nos. 205 and 206, were vital to petitioner's cause in the Circuit Court of Appeals and are just as vital in this Court. They were periodic reports of petitioner to his superiors, made contemporaneously with the disposition of the cases complained of by the prosecution and showing in each case the reason for and manner of their disposition (R. 952). The Circuit Court of Appeals had no opportunity to read these exhibits before entering its findings in this case.

(2) In support of its contention that petitioner had corruptly caused the grand jury to no-bill a case against co-defendant Kaplan, the Government attempted to show that the principal witness, one Cole, was not properly examined as to his knowledge. After testimony that this witness had testified on more than one occasion before the May 1938 grand jury, the prosecutor asked and secured "leave at this time to read his [Cole's] testimony before the May, 1938, grand jury." Exhibit 96 was then read to the jury (R. 574). Examination thereof will disclose that it contains the testimony of a number of witnesses before the grand jury but refers only to that part of Cole's testimony relating to his illness (offered as an excuse for perjury) and omits entirely any of his testimony as to the

merits of the case under investigation by the grand jury. That he did testify as to such merits and that the prosecuting attorney wilfully suppressed the transcript of such testimony adequately appears from the statement of the grand jury foreman that Cole was examined concerning his knowledge of "that still" (R. 607) and as well from the testimony of Cole himself (R. 576):

> I came down here before the grand jury and I was asked questions which brought up about Kaplan and different things, and I told them all I know about it.

It requires no argument to sustain the view that the jury, having Exhibit 96 in its possession, must have concluded therefrom, in disregard of the easily forgotten oral testimony, that petitioner made no attempt to obtain incriminating evidence from Cole.

(3) Prosecutor Ward was forced frequently to resort to the most obvious sort of leading questions to put into the mouth of witnesses testimony which would in some way involve a mention of petitioner's name. He persisted in assuming that witnesses had said things not said, and persistently examining them upon those assumptions. An example occurs in the direct examination of one Swanson, then subject to an alcohol violation indictment in Cleveland as well as another in Chicago.[8] Unsuccessful in his attempt to have the witness mention petitioner's name either directly or indirectly in relation to conversations had with third persons, the prosecutor asked the following suggestive and incriminating questions to which he received the following answers (R. 230):

> Q. And Dan was to get part of the money that was given him?

[8] Note the admission of this witness "I would rather commit a little perjury than go to the penitentiary" (R. 235).

A. Well, I don't know if he said Dan or Red, or something like that, either one.

Q. Either what?

A. Either one, Red or Dan.

Q. Didn't you know at that time who Kretske was referring to as Red?

A. Yes.

Q. Who?

A. Well, it was Glasser.

Note that the witness really says only that references to "Red" meant "Glasser" and not that "it was Glasser" who "was to get part of the money"—yet the jury would not be able to untangle this verbiage.

The recurring and persistent practice on the part of the prosecuting attorney in causing witnesses by leading and suggestive questions to give testimony of the type deemed favorable to the Government's cause is well exemplified at pages 229, 244-245, 289, 296, 301, 303-306, 380, 573, 612-613, 636, 659-660, 703 of the record.

These numerous conversations between witnesses and third parties, none in the presence of Glasser, by their very number must necessarily have weighed heavily with the jury. As said by this Court in *Berger* v. *United States*, 295 U. S. 78, 88:

> But, while he [the prosecuting attorney] may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

An example of the obvious attempts to discredit petitioner and mislead the jury as to the significance of plainly immaterial matters appears from the lengthy and searching cross-examination of petitioner by both the prosecutor and the judge with reference to an inaccurate statement as to a college degree in a so-called personnel questionnaire

signed by petitioner but filled out by his secretary one month before his resignation from the office of the United States Attorney (R. 989-991, 954).

(4) The callous disregard of the fundamental rights of an accused person, which characterizes the conduct of this case throughout on the part of the Government, is reflected in the surreptitious manner in which the Government submitted to the jury Exhibit 92. This was a pre-trial statement of Government witness Raubunas dated October 20, 1939, calculated to corroborate his testimony at the trial, and was highly prejudicial to petitioner in that it was one of the few items tending in any way to connect petitioner with the other defendants. The court sustained objection to its introduction (R. 712). It later developed, however, and clearly appears that this exhibit was included in a group of 33 exhibits submitted by the Government at the close of defendant's case and taken to the jury room (R. 1034). When the petitioner uncovered the fact that the prosecutor had surreptitiously so introduced the excluded statement of Raubunas as Exhibit 92, the prosecutor, in an attempt to deny responsibility for his act, stated in the Circuit Court of Appeals that Exhibit 92 was not formally received in evidence because of the objection raised by counsel for petitioner (R. 1100). The Circuit Court of Appeals dismisses this incident upon the mere statement that "mention was made" of Exhibit 92 (R. 1132).

We do not take space to set forth many further and similar abuses by the prosecutor of his official position and trust which appear in the record.

5. *The action of the judge effectually deprived petitioner of the presumption of innocence and denied him a fair and impartial trial.*—The most casual examination of this record will show many instances in which the trial judge undertook the function both of a witness and a prosecutor.

In the guise of an impartial arbiter and with all the weight attaching to his position in the eyes of the jury he was guilty of many actions prejudicial to the petitioner. Space permits but a few examples.

The judge clearly implied to the jury that he had personal knowledge of facts which he thought were relevant and material to the issues then being tried. During the examination of petitioner, without any previous reference having been made thereto, the judge asked (R. 941):

> "Did you know at that time that Nick Abosketas was under indictment in the eastern and western districts of Wisconsin?"

Later, without relevance to the matter as to which the witness was then being examined, the judge stated (R. 943):

> "I think my impression was there were two indictments pending in Wisconsin against Nick Abosketas on February 25th, 1938."

Later, again without relevance to the matter then being discussed, the judge stated (R. 1030):

> "At my request, the Government has furnished me with this. Let the record show that Nick Abosketas was indicted in the Western District of Wisconsin on January 27, 1936; and that he was indicted in the Western District of Wisconsin, July 20, 1938.

When asked the judge stated (R. 1030):

> "To the indictment in the Western District he pled guilty and was sentenced * * * After that, the indictment in the Eastern District was dismissed. It covers the same subject matter, I know that for a fact."

The last statement that was made before the defendants rested was made by the judge as follows (R. 1030):

> "I happen to know something about Nick Abosketas."

It is respectfully submitted that the above falls clearly within the rule laid down by this court in *Quercia* v. *United States*, 289 U. S. 466, 470:

> This privilege of the judge to comment on the facts has its inherent limitations. * * * In commenting upon testimony he may not assume the role of a witness.

The same principle inheres in the rule as stated in *Terrell* v. *United States*, 6 F. (2d) 498, 499 (C. C. A. 4):

> It seems clear beyond argument that it would be fatal to any conviction of crime that it was founded on references by the trial judge to facts within his knowledge. Indeed, a judge presiding at a trial is not a competent witness, for the duties of a judge and a witness are incompatible. * * * The danger to the dignity of the bench, of subjecting its impartiality to doubt and of placing the defendant at an unfair disadvantage by admitting the presiding judge as a witness is very obvious.

Usurpation of the functions of an advocate appears from the reiteration by the judge of the testimony of the chief clerk of the office of the United States Attorney that of 20 cases presented to the April, 1937 grand jury twelve no-bills were returned (R. 196):

> The Court: That is the total number of cases presented?
> A. By Mr. Glasser.
> The Court: To this Grand Jury.
> A. Yes, sir.
> The Court: And of the twenty there were twelve No Bills?

It is, of course, impossible to reproduce on the printed page the air of disapproval with which this rhetorical question was asked. Yet the court refused to allow in evidence the report of this Grand Jury which clearly explains that these no-bills were attributable to failures of the Alcohol Tax Unit (R. 789-795).

In examining another witness, despite the showing in the record that the indictment against the witness was still pending (R. 236, 238, 317; 918-921, 837)—that the case had been merely struck from the docket with leave to reinstate—the court attempted to synthesize the Government's theory by asking the question (R. 346):

> "You were never convicted, never paid a fine and never went to jail?"

In examining another witness accused in the same pending indictment, the court asked (R. 232):

> "The case just dropped out of mid-air?"

Since the case was still pending, the indicated answer was given to each question; the prejudicial effect on the jury is plain. Again, in direct conflict with this same record showing, the court stated in a later question that this indictment had been discharged (R. 348).

Gross abuse of his position by the judge appears in the course of examination of petitioner's witness, Judge Igoe. Earlier, an imputation of breach of duty had been attempted by testimony of Alcohol Tax Unit Agent Bailey that petitioner had failed to prosecute on a conspiracy count a large number of defendants named in the agent's report and had prosecuted only four on substantive counts (R. 708-709). To refute any inference of corruption, petitioner sought to show by Judge Igoe (who had at the time been his superior) that his action had been duly approved after review of the agent's report (R. 891, 902). The objectionable conduct of the court appears from the following (R. 901-902):

> Mr. Stewart: Yes. Isn't it a fact, Judge, that you studied that long report, calling your attention to this particular report here (indicating).
>
> The Court: He had undoubtedly hundreds of reports to look at.
>
> Mr. Stewart: Q. The particular report you have in your hand, I will give it the Exhibit number so there

won't be any mistake about it. Number 160, wherein Mr. Bailey, special investigator——

The Witness: A. I assume that report contains a detailed statement of what evidence would be submitted which would involve the Hodorowicz brothers.

Mr. Stewart: That is right. Now I will ask you first, was it not your first instruction to your assistant, Mr. Glasser——

The Court: Just a minute, Mr. Stewart. I am suggesting this, it was my impression the testimony that Mr. Bailey submitted this report to Mr. Glasser after he had completed this investigation which was some time after Mr. Glasser and Mr. Bailey had consulted with Judge Igoe.

Mr. Ward: That is my understanding.

The Court: That is why I thought the Judge ought to have a chance to study this particular report to see when it was submitted.

Mr. Stewart: My understanding of that, your Honor, is, Mr. Bailey came here from Washington.

The Court: Just a minute. Let me ask Mr. Bailey.

Mr. Bailey, you have already testified that you visited Judge Igoe who was then District Attorney with Mr. Glasser, with reference to the Hodorowicz brothers?

Mr. Bailey: Yes, sir.

The Court: At that time did you have this report that we have marked Exhibit 160? Did you have this report marked Exhibit 160 with you and did you submit it to Judge Igoe?

Mr. Bailey: I did not, sir.

The Court: That is my impression, there is some other report and Judge Igoe must have seen, I don't think it is fair to the Judge to confine him to this particular question of this Exhibit until he has a chance to examine it because my impression was Mr. Bailey had not completed his investigation at the time they called upon Judge Igoe and Judge Igoe said "Go out and complete your investigation", and then "Mr. Glasser, I want to hear further from you, and submit this to the Jury."

Mr. Stewart: That is not my memory of the testimony.

The Court: What is your recollection? Just a minute.

Mr. Bailey: Your Honor, I talked to him but on one occasion in my life, and that was on the 26th of January, 1938; at that time that report was not completed. I had no report with me on that occasion.

The Court: That is Exhibit 160.

Mr. Bailey: That is correct. I turned that report over in Mr. Glasser's office on April 21, 1938.

The Court: That is what I thought; that is what made me confused as to the report.

The judge thus interrupted the examination to refute the testimony of the witness, Judge Igoe, by what purported to be a reiteration of the earlier testimony adduced from Agent Bailey (R. 708). The crucial point here, of course, was whether Judge Igoe had seen the report before directing petitioner to present the violations as substantive crimes. Yet, under the guise of solicitude for Judge Igoe the court obfuscated the real issue, confirmed for the jury the credibility of the Government's witness, twice reiterated his impression of the earlier testimony as proving that Judge Igoe had never seen this report, indicated that Judge Igoe was mistaken in his testimony and effectually deprived petitioner of its benefit. In accomplishing this result he also interrupted the witness to examine agent Bailey who was seated at the prosecutor's table. It helped Glasser very little that his witness finally managed to testify that he had seen the report and had directed petitioner's actions (R. 903).

In the course of examination of another witness, the court plainly misled the jury to the great prejudice of petitioner. There is, of course, no presentation of evidence upon a mere arraignment. Yet the trial court,—despite the plain state of the record, showing the proceeding in issue was

an arraignment only for the purpose of taking pleas after indictment (R. 232)—persisted in treating an arraignment as though it should have been a trial (R. 347-348):

> The Court: Were the facts brought out before the Judge in your presence, so that the Judge knew the facts?
>
> A. No.
>
> • • • • • • • •
>
> Q. Was there a full disclosure of facts made before Judge Woodward, as to your connection in that case?
>
> A. No, not that I heard of. I was sitting at the bench.
>
> Q. Were you called before the Judge at any time?
>
> A. Just to mention our names, to be present.
>
> Q. The Judge did not ask you any questions?
>
> A. No.
>
> Q. The lawyer didn't ask you any questions in front of the Judge?
>
> A. No.
>
> Q. Did Mr. Glasser ask you anything in front of the Judge?
>
> A. No.
>
> Q. So you don't know,—your recollection is that there was not a complete disclosure of all the facts that connect you with that case, before the Judge?

Had the court instructed the jury that failure to disclose all facts on an arraignment was breach of duty on the part of petitioner, it could be made the basis of an assignment of error. But what protection has he against innuendoes such as these?

The rulings of the judge on admissibility of evidence appear also to be arbitrary and the result of bias. To refute the contention that he had failed to prosecute cases on which reports had been made by agents, petitioner offered the report of the April 1937 Grand Jury which stated that the agents in many instances were negligent or ignorant in obtaining evidence by illegal searches and

seizures and cited a specific instance of such negligence causing the voting of a no-bill. This report further praised petitioner's work and expressed confidence in his ability, if unhampered, to clean up the real heads of the alcohol ring (R. 789-795). Yet the court denied this offer of proof of a record of the court (R. 795). On the other hand, to show failure by petitioner properly to prosecute, the Government resorted to, and the judge permitted over objection, introduction of two reports by Alcohol Tax Unit agents showing the facts ascertained by them with regard to two distilleries in which Kaplan, a co-defendant, was implicated (Exhibits Nos. 81A and 113) (R. 529, 532). The jury, of course, assumed that these contained competent evidence which petitioner could use in obtaining an indictment and in prosecution, whereas they could not be used at all before the grand jury. Furthermore, the witnesses named might not testify as the investigators expected, and they might be unreliable or unavailable at the time of the grand jury investigation. These exhibits were plainly incompetent for their obvious purpose—to show that petitioner had ample evidence to obtain indictments and conviction but failed to use it. The only excuse offered for their introduction was that they put Glasser on notice as to a violation of law. But notice had already been established by the statement of a Government witness that the cases had been presented to the grand jury (R. 528-529). The opinion of the Circuit Court of Appeals justifies admission of these exhibits on the ground that they "threw light upon the question" (R. 1132).

Space does not permit the discussion of further incidents of this character, with which the record is replete.

6. *The record is utterly devoid of evidence to support the verdict against petitioner.*—All the persons indicted with petitioner denied having ever given or promised Glasser any

bribe or having ever conspired with him either to solicit bribes or for any other purpose (R. 799, 722, 755, 837-838). There was no evidence of any kind, either direct or indirect, that Glasser ever received a bribe and none that he ever solicited any. Indeed the prosecutor stated (R. 154): "There isn't anything in this indictment that says that anybody paid Glasser a bribe." The Government's vague theory was that "There was a conspiracy on foot to solicit certain persons to make promises" (R. 154).

It is clear that this prosecution is based entirely on the testimony secured and prepared by the agents of the Alcohol Tax Unit. Other than that of Alcohol Tax Unit representatives, the evidence of the Government in the main consisted of testimony adduced from twenty-five confessed and convicted bootleggers, all of whom had been prosecuted and in many cases convicted by petitioner. At the time of the trial, all of these witnesses either had cases pending, were serving penitentiary sentences, were on probation, or had motions for probation pending (R. 663, 569, 245, 537, 276, 700, 689, 265, 342, 295, 254, 616, 408, 619, 452, 380, 250, 623, 556, 643, 197, 676, 631).

Three of the federal judges before whom Glasser regularly appeared testified as to the uniformly able manner in which Glasser discharged his duties as prosecutor (R. 720, 738, 904). Judge Igoe, who as United States Attorney was Glasser's superior during the period involved, testified that he was familiar with, and had personally approved of the manner of disposition of, the cases complained of (R. 890-910).

The evidence as reviewed by the court below.—The opinion of the Circuit Court of Appeals details what it describes as "the more important facts and appellant's connection or association with the suits and matters involved in the conspiracy" (R. 1122-1127). The following chart, setting forth the statements of the court below in one column and the

record in a parallel column, will conclusively demonstrate not only the misconceptions of the court below but the complete lack of any semblance of evidence against petitioner Glasser:

Opinion of Court Below	*The Facts of Record*
The Chrysler Sedan Case	
"It was a libel action in which it was charged that the automobile, seized upon the premises of one Leo Vitale at Peru, Illinois, had been used in connection with a liquor tax violation. The cause came up for hearing before a District Judge on December 23, 1938. Appellee was represented by Glasser, and Roth represented Rose Vitale, wife of Leo Votale. Roth informed the trial court that the automobile belonged to Mrs. Vitale and had not been used in the manufacture of alcohol. Thereupon an investigator of the Alcohol Tax Unit, who had caused the seizure, informed Glasser that Roth was not informing the court of the true facts nor advising the court that Vitale had heretofore been convicted and sentenced to the penitentiary in the Southern District of Illinois for Liquor Tax Violations, and requested that he be permitted to so advise the trial court. Glasser directed the investigator to leave the	This civil case was tried upon the Alcohol Tax Unit report. (R. 717). Judge Barnes, who had tried the case, appeared as a witness for petitioner and stated that he "had no more right to take that car than I had to take yours" (R. 718). Judge Barnes further testified that Glasser and Roth represented their respective clients properly (R. 718). The agent's report (Ex. 36), upon which the case was tried, states the basis of forfeiture as, "In its rear compartment or trunk were marks or rings on the floor where cans of alcohol had been sitting. These marks were very pronounced, and showed plainly where the corner of the cans had been cut into the wood of the trunk separation". Judge Barnes testified further (R. 717), "I remember that case, the claimant was the wife of the bootlegger" — which shows that the statement in the opinion that the court was not told of Vitale's rec-

court room. The trial court ordered the automobile be returned to Rose Vitale (R. 1123).

"Shortly after December 23, 1938 this investigator informed Glasser that he had a number of witnesses to whom Vitale had said that he (Vitale) had "got out of this for $900" and the investigator suggested that Glasser inquire of Vitale as to who received the $900. Glasser said he would, but he never did". (R. 1123).

ord is erroneous; moreover, this was an action in rem in which the criminal record of the husband of the claimant of the property would not be admissible as testimony; and in any event the agent's report (Ex. 36), on which the case was tried and which was read to the judge trying the case (R. 717), included the criminal record of the claimant's husband.

The investigator testified that he told Glasser, "Let us bring him in and see who got those nine hundred dollars" (R. 221). By "us" the agents meant the Alcohol Tax Unit. Glasser had no way of bringing Vitale in, since that was a job assigned to the investigator; if Agent Dowd placed any credence in the matter he would, and should, have rendered a written report thereon officially recommending and authorizing further proceedings. This he did not do.

The Swanson and Del Rocco Matter

"Elmer Swanson and Patsy Del Rocco, in the latter part of 1936, were engaged in the illicit manufacture of alcohol at 116 W. 119th Street, Chicago, Illinois. The still was seized by the Government. Within a

There was no testimony by anyone that Glasser ever even knew that Swanson and Del Rocco were involved in the operation of the still. Neither was there any report by the Alcohol Tax investigators of such a case involv-

short time after the seizure Swanson met the defendant Horton, who informed Swanson that Swanson and Del Rocco were going to be indicted, but that he (Horton) could take care of it for $500 which would be taken down town and given to the boss. He mentioned "Red" as the boss. It is undisputed that Glasser has red hair and is known as "Red". The $500 was paid to Horton in currency. Nothing more was heard concerning the seizure of the still after the payment of the $500 nor were Swanson or Del Rocco indicted." (R. 1123-1124).

ing these parties. This still was not discovered by investigation but as the result of a fire. No arrests were made at the time, and later the Alcohol agents arrested only one Joppek (R. 249). Of course, the prosecutor (Glasser) could normally prosecute no one until a violation was brought to his attention by the Alcohol agents. While Glasser has slightly reddish hair, there is no testimony that Glasser was known as "Red" and Kretske denied that he knew who was meant by "the Red Head" (R. 804).

Still at 6949 Stoney Island Ave., Chicago

"It further appears that on December 31, 1937, Swanson and the Hodorowicz Brothers operated another still at 6949 Stoney Island Avenue, Chicago, Illinois, which also was seized by the Government. Swanson was arrested and arranged for bail through Horton. Roth was retained as an attorney to defend, having been recommended by Kretske, whom Swanson had met at Hodorowicz' hardware store.

"Frank Hodorowicz operated a hardware store at 11823 South Michigan Ave-

Frank Hodorowicz testified about giving money to Kretske to "take care" of the case but made no mention as to who was to get the money from Kretske. The Judge (R. 298) asked:

> "Q. Did he tell you how he was going to take care of that?
>
> "A. No."

Anthony Hodorowicz testified to no conversation and said that Kretske was only consulted with a view to getting him to suggest a lawyer "to defend the boys" (R. 345). Clem Dowiat did

nue and it was there, early in 1938, that Kretske, Horton, Hodorowicz and Swanson met. Horton introduced Kretske. There it was that Kretske said he would take care of the case; for $1200 'it was supposed to be fixed up so nobody goes to jail'. $500 in currency was paid to Kretske at his office, the balance to be paid later. At that conversation Kretske said 'don't worry about a thing. Everything will be taken care of'. Kretske also said that Glasser was to get part of the money and part was to take care of another lawyer". (R. 1124).

"The case was placed on Judge Woodward's calendar, Glasser representing the Government and Roth the defendants. On April 28, 1938, on Glasser's motion, the indictment was stricken with leave to reinstate. Swanson paid no money to Roth for his services". (R. 1124).

not testify to any corrupt dealing or conversation (R. 273-274). Elmer Swanson finally testified, changing his mind as to the amount, that the money was paid to Kretske (R. 229) but, as to Kretske's accomplice, he didn't "know if he said Dan or Red or something like that, either one" (R. 230). Christ Del Rocco testified that the money was given to Kretske but said that Kretske's accomplice "was none of our business, that was his" and, when pressed to name Glasser, gave an "inaudible answer" (R. 244-245).

The indictment was not stricken, but was merely taken off the call calendar or docket, at the request of the agent in charge of the Alcohol Tax Unit, to be reinstated on five days' notice (R. 918-921). It has not yet been reinstated.

Still in Garage at 118th Place, Chicago

"Prior to September 1, 1937, an illegal still was being operated in a garage at 118th Place, Chicago. On September 1, 1937, investigators of the Alcohol Tax Unit raided the garage and

In this case the Agent who had made the affidavit for the search warrant did not give the correct address of the premises which housed the still, which was a fatal defect (R. 277-279). A

arrested Peter Hodorowicz and Clem Dowiat. After the arrest, Frank Hodorowicz called upon Kretske [former Assistant United States Attorney and co-defendant herein] and inquired whether Kretske could take care of the case and was told that he (Kretske) "would have to look into it". Kretske told Hodorowicz to return in a few days. On September 23, 1937, Hodorowicz again called upon Kretske and was informed that for $800, to be delivered to Red, the case could be settled. Hodorowicz gave Kretske $800. After the money was given to Kretske, Kretske informed Hodorowicz that "Everything is taken care of for tomorrow morning". The next morning Peter Hodorowicz and Clem Dowiat were discharged by the United States Commissioner." (R. 1124).

week before the hearing, petition to suppress on that ground was filed by attorney Balaban who had no connection with Kretske (R. 728). The evidence in connection with the petition to suppress was heard on September 23, 1937, and the case was put over for finding by the Commissioner to September 24 (R. 285-286). If Kretske had examined the Commissioner's file—which is a public record—or had been present at the hearing, Kretske would have known that the case would of necessity be dismissed the following morning. There was nothing that Glasser could have done to prevent this result. Investigator Rossner, a Government witness, testified that at the hearing before the Commissioner he gave all the evidence he had in support of the case and did not withhold anything (R. 279).

The Frank Hodorowicz Conversation with Glasser

"It further appears that on June 3, 1938, Clem Dowiat and Frank and Peter Hodorowicz were indicted, charged with unlawful possession of distilled spirits. Roth was retained to represent the defendants, and

Hodorowicz' complaint about a "raw deal" casts no suspicion upon Glasser, as Hodorowicz meant that he (Hodorowicz) was innocent of the liquor charge and that the agents had lied about him (R. 337); Hodorowicz

while the case was pending in the District Court Frank Hodorowicz and Kretske had a conversation in which Kretske stated that nothing could be done for Hodorowicz because "There is too much heat." Thereafter Frank Hodorowicz called at Glasser's office and complained that he was getting a raw deal to which complaint Glasser replied: "Bailey says he will get my job if I don't put you away", and "all the money in the world • • • can't do you no good this time" (R. 1125).

also complained of his indictment to Investigator Bailey, saying "it was dishonest" and "I told him he ain't fair and all like that" (R. 338). As to Glasser's remark that "Bailey • • • will get my job if I don't put you away", the record is clear that this was spoken in jest, in the public corridor of the courthouse, and in the presence of Bailey and others (R. 710). Hodorowicz and Glasser also had a conversation in the presence of Investigator Burns, in which it is not denied that Glasser admonished Hodorowicz, who had been indicted in 1929 but not tried (Ex. 160), that the latter "this time" was going to the penitentiary (R. 928). The quoted remarks about the money were occasioned by Hodorowicz' statement that he would spend $10,000 to get out of his trouble, to which it is not denied that Glasser replied, "If you spent ten million dollars, it won't do you any good" (R. 929). The court below has quoted from Hodorowicz' version of this conversation (R. 303-304) wherein Hodorowicz related that he had asked Glasser whether he (Hodorowicz) should retain a well-known

lawyer named Hess — to which, as even Hodorowicz says, Glasser replied, "For all the money in the world he [Hess] can't do you no good this time" (R. 304). But the court below has quoted only part of this sentence, has eliminated by asterisks the reference of the language to Hess, has thus made it appear that the money was offered to Glasser, and has in one sentence linked the excerpt with another excerpt from the corridor banter with Bailey (R. 710) mentioned above—in order to make it appear that, threatened by Bailey, Glasser refused a bribe. This is a plain, obvious and gross distortion of the record.

"After this conversation Roth's services were dispensed with and other counsel represented the defendants in that case. They were found guilty and on appeal the judgment was affirmed. *United States* v. *Hodorowicz, et al.*, 105 F. (2) 220" (R. 1125).

Roth, as a matter of fact, had been "released • • • from the case" *before* this conversation took place (R. 302). It may also be noted that Glasser later successfully prosecuted Hodorowicz and other members of his family (R. 319, 322), and at this trial Hodorowicz flatly denied that he had attempted "any fixing" in his case (R. 330-331).

Western Avenue Still Case

"On September 10, 1935, while one Victor Raubunas

Raubunas testified that on September 10, 1935, he paid

was conducting a tavern in Chicago, the defendant Kaplan came to the tavern and suggested that Raubunas engage in the illegal manufacture of alcohol, assuring Raubunas that the business would be protected "through the Federal Building" but that it would cost $1,000 to secure the protection. Raubunas gave Kaplan $1,000 and thereafter Raubunas, Kaplan, Adam Widzes and one Ralph Bogush operated a still at 2524 South Western Avenue. On July 2, 1936 investigators of the Alcohol Tax Unit raided the premises and seized the equipment.

"During 1936 Kaplan and Raubunas had other transactions involving the illegal manufacture of untaxpaid spirits and Raubunas made several visits to a garage operated by Kaplan at Kedzie and Ogden Avenues. On one of these visits he saw Kaplan enter an automobile with Kretske and Glasser and drive away with them" (R. 1125).

$1,000 to become a partner in the still and not, as the opinion intimates, to secure "protection" (R. 453). Raubunas was thereafter convicted, on July 19, 1939, and sentenced to three years in the penitentiary on an indictment drawn and presented by Glasser. Still later on July 27, 1939, while in custody, he gave a statement to the Government with reference to certain facts in the present case (Exhibit 84, R. 486),—in which statement he made no mention of the fact that he had ever seen Glasser, Kaplan and Kretske together (when confronted with this fact at the trial herein, he had no answer; R. 490). After giving this statement to the Government in 1939, Raubunas was sent to the penitentiary at Leavenworth and, after being there a while, was brought back to Chicago (R. 491). He testified before the September Grand Jury (Overt Acts No. 44 and 45, R. 21) to the effect that Glasser, Kretske and Kaplan met on two occasions *in 1938*, once at Kedzie and Ogden Avenues and once at Kedzie and Douglas Avenues. The indictment in this case was filed on September 29, 1939.

Raubunas was kept in Chicago for 44 days after being brought from the penitentiary, and he was questioned repeatedly by the agents (R. 526). On October 20, 1939, he gave his second written statement to the Government (Exhibit 92) in which he stated that he had seen Glasser, Kretske and Kaplan meet on three occasions *in 1936* and that all three meetings were held at Douglas and Kedzie Avenues. Kretske denied being in an automobile with Kaplan and Glasser (R. 809) and Kaplan denied that he ever was in an automobile with either Glasser or Kretske (R. 722). Assuming that Raubunas was to be believed, nevertheless guilty knowledge on Glasser's part "could not be inferred * * * from the casual and unexplained meetings of some of the respondents with others who were convicted as conspirators." *United States* v. *Falcone*, U. S. Sup. Ct., December 9, 1940, 85 L. Ed. 143, 146. *A fortiori*, actual participation cannot be so inferred.

"In July, 1937, the Alcohol Tax Unit brought to Glasser's attention the Western Avenue and Spring Grove still violations and

No testimony of any kind was introduced to connect Glasser with any corrupt dealings in connection with this no-bill. The conclud-

requested prosecution. Written reports containing information implicating Kaplan, Raubunas and others were furnished. Glasser appeared before the Grand Jury. The Grand Jury returned a No Bill against Kaplan, Raubunas, Widzes and Bogush in the Western Avenue still." (R. 1125-1126).

ing paragraph of the investigator's report (Exhibit 81) states that the witnesses were more or less reluctant and had given contradictory statements, and it suggested that the United States Attorney call them to his office for the purpose of trying to get proper testimony from them. The evidence of the Government shows that Glasser took them before the Grand Jury (R. 528). Of course, the return of a no-bill did not preclude the Government from further criminal proceedings. Long after Glasser left office, the Government secured an information against only Kaplan and even that was dismissed on motion of the Government after the trial herein was concluded (R. 1046-1047).

Spring Grove Still Case—

"In October or November of 1936 Raubunas, Kaplan, Edward R. Dewes and several other men operated a still, manufacturing alcohol, at Spring Grove, Illinois, until January 1937, when it too was raided by Government officers. • • •

"It further appeared that the Alcohol Tax Unit commenced its investigation of

The opinion seems to indicate that Glasser did not tell the Grand Jury to indict Kaplan, Raubunas, and Dewes—but the evidence of the Government in this case showed that Glasser presented to the Grand Jury all the witnesses available to him (R. 529) and gave them the names of *all* prospective defendants, including Kaplan,

the Spring Grove still on February 10, 1937, a final report being submitted to the District Attorney in July 1937. Between February and July of 1937 several of the investigators held conferences with Glasser regarding the names of possible witnesses and their testimony. Glasser informed one of the investigators that he had heard that Kaplan was a notorious bootlegger and that there was sufficient evidence to obtain his indictment and conviction.

"On May 15, 1938, after the defendant Horton had informed Edward R. Dewes that Kretske desired to see Dewes, Horton and Dewes called at Kretske's office. There Kretske advised Dewes that the grand jury was in session, and that if Dewes could raise $100, he (Dewes) would not be indicted for the Spring Grove still. On May 17, 1938, at Kretske's office in the presence of Horton, Dewes gave Kretske $100. The money, Kretske said, would be sent over to the red-head.

"It further appears that Glasser presented the evidence relative to the Spring Grove still to the grand jury on May 17, 1938 and told the jurors who should be named Raubunas, and Dewes. Kaplan's name was first on the list (R. 530). The Grand Jury simply did not follow Glasser's recommendations as demonstrated by the testimony by the foreman of the Grand Jury, Gates, that the jurymen exercised their "best judgment as to who to indict and who should be no-billed." (R. 608). Indeed, far from implicating Glasser, Raubunas testified, in connection with this incident, that Alcohol Agent White "looks after everybody" (R. 466).

in the true bill. Notwithstanding there was evidence implicating Kaplan, Dewes and Raubunas, a No Bill was returned against them." (R. 1125-1126).

The Kwiatowski Case.

"On August 25, 1938, one Walter Kwiatowski was arrested while driving an automobile containing untaxpaid alcohol, taken to Glasser's office and charged with unlawful possession of distilled spirits. He was released from custody upon a bail bond furnished by defendant Horton. Prior to the hearing before the United States Commissioner, Horton informed Kwiatowski that "he could fix the case for $600." Kwiatowski withdrew $3,750 from his savings account in a Chicago bank and gave Horton $600. The Commissioner dismissed the complaint. Glasser appeared for the Government.

"On November 10, 1938, the Treasury Department requested Glasser to present the Kwiatowski case to the Grand Jury. Glasser took no action in the matter." (R. 1126-1127).

The statement that Kwiatowski was arrested in a car containing untaxpaid alcohol is incorrect; he was arrested while walking in an alley with the liquor in his pockets (R. 397). Kwiatowski could not read English; a polished statement purporting to be his and containing the statements paraphrased by Agent Bailey was introduced (R. 412-414); he testified that he did not understand many words in the statement (R. 416-417); and, as to Horton's asking or receiving $600, he testified, "No, I no give him" (R. 415). As to the proceedings before the Commissioner, Investigator Rossner testified for the Government (R. 398) that he made a full disclosure of the facts at the hearing before the Commissioner, after which the Commissioner stated that the agent had no right to arrest Kwiatowski and Kwiatowski was discharged by the Commissioner (R. 397).

Quite contrary to the statement of the court, there is no evidence that Glasser was ever requested by the Alcohol Tax Unit to reopen the Kwiatowski case; there was no proof that the so-called letter and report (R. 585-586) of November 10, 1938, were ever delivered to Glasser; Glasser denied that he ever received this supplemental report or had any recollection of the letter (R. 963); and, if received, the case would not in the ordinary course have been presented to the Grand Jury until after Glasser left office early in the following year (R. 912). Not only does the record fall far short of implicating Glasser; it shows that the trial court refused to permit proof that one of the Alcohol Tax investigators in the case "was discharged * * * for taking bribes" (R. 394-395).

The Abosketes Matter.

"In February, 1938, Investigator Thomas Bailey informed Glasser that one Frank Brown, recently convicted of a liquor violation and confined in the Cook County Jail, desired to impart information relative to others implicated in the vio-

The court connects Glasser with this case only in stating that convict Brown was brought to his office in February of 1938 to give testimony about Abosketes, and that thereafter Brantman began dealing with Abosketes. However, Abos-

lation. Brown was brought to Glasser's office and there stated that one Nick Aboskетes was connected with the illegal operation of the still upon the Murdock Farm, in Illinois. Shortly thereafter one William M. Brantman from Chicago, called Nick Abosketes over the telephone at Milwaukee, Wisconsin. The following day Abosketes came to Brantman's office in Chicago. Brantman told Abosketes that he had connections with the Federal Building and could stop things, and that Brown had given certain information to the Federal people connecting him with the Murdock Farm still. On April 19, 1938, Abosketes paid Brantman $3,000 in cash, obtaining therefor a receipt in which Brantman stated the money was being paid on account of services. Brantman never rendered any service to Abosketes. Several weeks later Brantman called upon Abosketes at Milwaukee and informed Abosketes that everything was stopped and under control. The record discloses that the $3,000 was delivered to Kretske" (R. 1127).

ketes began dealing with Brantman not after Brown's interview with Glasser, as the court below states, but *before* (Question at bottom of R. 663; answer, because of printer's error, at top of R. 658); and R. 649). Both Abosketes (R. 668) and Brantman (R. 656) testified that they did not know Glasser. No shred of evidence connects Glasser with any unlawful aspect of this incident.

Nowhere in its opinion does the court below say that Glasser was derelict in his duty as a public prosecutor—its

conclusion is merely that "it was the province of the jury to consider" the foregoing circumstances (R. 1129). The court below points to no other evidence and, under the rule that it states (R. 1130) "no conviction can be had" since "the evidence is as consistent with the innocence of the [petitioner] as with [his] guilt." Yet the court feels "compelled to the conclusion that the verdict is supported by substantial evidence" (R. 1130). It would be difficult to imagine a clearer case of lip service to the rule accompanied by disregard of its import.

Total lack of evidence of knowledge on the part of petitioner of the alleged conspiracy.—A vital flaw in the evidence against petitioner is adequately disclosed by a reference to the only evidence presented by the prosecution to show knowledge of the alleged conspiracy on the part of the petitioner.

We here invoke the rule recently laid down by this court in *United States* v. *Falcone* (Dec. 9, 1940), 85 L. Ed. 143, that, since the gist of the offense of the conspiracy is agreement among the conspirators to commit an offense attended by an act of one or more of them for its effectuation, the showing of relationship of a defendant to one of the conspirators, even if accompanied with acts on his part which furthered the object of conspiracy, is without probative weight in the absence of a showing of knowledge of the conspiracy on the part of such defendant. This Court there (p. 146) laid it down that guilty knowledge cannot be inferred "from the casual and unexplained meetings of some of respondents with others who were convicted as conspirators."

The basic theory of the prosecution was that proof of the dismissal of charges against a defendant or the voting of a no-bill by the grand jury, even though justified, was sufficient to sustain conviction of petitioner upon testimony of a coincidental payment of money to third persons for the purported purpose of obtaining such a result.

The Government was required to bridge the gap between conversations between other parties indicating payments of money and the only acts shown as to petitioner—his participation as a prosecutor in the proceedings before the United States commissioner and grand jury. The only link offered was the testimony of three persons prosecuted by petitioner—namely, Raubunas, Svec and Frank Hodorowicz. The testimony of these three, taken singly or together, even if its inherently incredible character be disregarded, in no way affords justification for a conclusion that Glasser had any knowledge whatsoever of the existence of the alleged conspiracy.

Raubunas, at the time of the trial under a three year penitentiary sentence now being served in a reformatory (R. 452), had been indicted by petitioner. He testified that on three occasions he had seen one of the other codefendants enter an automobile in which petitioner and Kretske, another co-defendant, were seated (R. 476).

Svec—twice prosecuted by petitioner and, at the time of the trial, serving a penitentiary sentence on the second conviction (R. 556)—testified that on two occasions he had seen petitioner drive past a barber shop at 1062 Polk Street in Chicago, sound his horn, and turn a corner immediately west of the barber shop (R. 563).[9]

The only other item of evidence which has been suggested to show knowledge on the part of the petitioner of any conspiracy is a statement attributed to him by Frank Hodorowicz—a convicted bootlegger convicted by petitioner (R. 322). Hodorowicz testified that Glasser told him, "for all the money in the world he can't do you no good this time" (R. 304). The most casual examination of the text of the

[9] Stricken from the record was the further statement of this witness that when the horn was blown, Yarrio, a habitue of the barber shop said, "That is Red, I guess I have to go see him," and immediately left the barber shop walking in the same direction in which the car had gone (R. 569).

record clearly shows that the word "he" referred not to petitioner Glasser but to Attorney Hess whom Hodorowicz contemplated retaining. The Court below, however, in quoting this statement (R. 1125) omits the word "he" and attributes the reference to Glasser rather than to Hess. This alleged conversation in no way tends to connect Glasser with any of the other alleged parties to the purported conspiracy or to show on his part knowledge thereof.[10]

These are the only possible bases for assertion of any knowledge on the part of the petitioner of the existence of the alleged conspiracy. It is submitted that under the principle announced in the *Falcone* case, there is left no possible evidence upon which the jury could properly find him guilty. We challenge the Government to show in what way these items may properly be regarded as connecting petitioner with the conspiracy. Or, failing that, let the Government affirmatively point out any evidence in the record which may be properly regarded as showing connection. If such showing is made or if evidence can be produced to the satisfaction of this Court the petitioner is content to

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[10] The utter lack of justification for emphasis on the phrase "this time" is clearly disclosed by the fact that Hodorowicz is shown to have amassed a fortune of $150,000 in the illicit liquor business, over a period of some fifteen years; he, with his brother, had been indicted in 1929 in the United States District Court for the Northern District of Indiana at Hammond, within five miles of a large hardware store openly operated by him; neither had ever been arrested on that indictment (Ex. 160, R. 324). Glasser, as prosecutor, obtained an indictment in June 1938 and conviction in February 1939 of Hodorowicz and his brothers (R. 322).

The petition of Hodorowicz for probation, sworn to on October 10, 1939 (after this trial and the day after his petition for certiorari was denied, 308 U. S. 584) states that he had, subsequent to conviction, assisted Government agents in other criminal investigations (R. 324). Reference to the original Exhibit No. 52 will show that this petition for probation is written on United States Government bond paper and at the middle of the top of the first page bears as the initials of the dictator "MW" (Martin Ward, the prosecutor in this case). These are concealed under the overlap of a blue backing cover which bears the name of counsel for Hodorowicz.

abandon the point. On the other hand, if such evidence cannot be produced, the law plainly requires that the Government confess error.

7. *A charge of conspiracy to commit a substantive offense, which itself necessarily involves concerted action—that is, a charge of conspiracy to conspire—will not lie; and, as such is the charge, if any is here made, the indictment is fatally defective.* As asserted in the demurrer below (R. 48-50), we believe the indictment to be so vague and indefinite as to fail to inform the defendant of the charge against him, making it insufficient in law. The indictment, however, purports to be for conspiracy. Its charging part (Par. 14, R. 28) is framed in the words of Title 18 U. S. C. sec. 91. That section contemplates the punishment of persons who do, and the indictment charges conspiracy by the defendants to, promise or offer or cause to be promised or offered money or other things of value to an officer of the United States with intent to induce such officer to do or to omit from doing certain acts in violation of his lawful duty. This appears not only from the indictment itself but from the corroborating statement by the prosecutor who drafted it and said (R. 154):

> This indictment follows very closely the language of Section 91.

The indictment must, therefore, be given a like construction. *Thornhill* v. *Alabama*, 310 U. S. 96.

Since the indictment charges the offense in the words of the substantive statute which itself involves concerted action by two or more parties, it is bad in that it in effect charges a conspiracy to conspire which cannot rightly be made the subject of a conspiracy charged under 18 U. S. C. sec. 88. This rule was recognized in *United States* v. *Manton*, 107 F. (2d) 834, cert. denied 309 U. S. 664, but it

was pointed out (p. 839) that there the indictment did not "charge a conspiracy to give or accept bribes".

Here, however, the indictment does charge a conspiracy to defraud by the promising, offering, causing and procuring to be promised and offered, of money and other things of value to an officer of the United States with intent to influence such officer to commit and collude in committing certain frauds on the United States (R. 28).

So far as petitioner is concerned, it is plain that, in so far as he might be charged with violation of the substantive statute, concert of action with at least one other party would be essential, since if he, with the necessary intent to influence his own decision and "to collude in committing certain frauds on the United States," were to procure another to promise, offer or give any money to him, it would necessarily contemplate active participation on his part as well as on the part of the other person. Since concert of action and the plurality of agents would have been necessary to commission of the substantive offense which is in the indictment charged to have been the objective of the conspiracy, the indictment is void. *United States* v. *Dietrich*, 126 Fed. 664, 667; *United States* v. *Sager*, 49 F. (2d) 725, 727; *Gebardi* v. *United States*, 287 U. S. 122.

Obviously, the indictment herein clearly flies in the face of established law and is fatally defective. The tenuous and unprecedented form of this indictment was undoubtedly invented because of the inherent weakness of the Government's case. Nevertheless, invention and ingenuity cannot make basic criminal law. The indictment, upon clear precedent, is a nullity.

Conclusion.

Petitioner, a member of the bar of this Court, has been tried before a packed jury, denied the effective service of

counsel of his choice, deprived of a fair trial by the improper and prejudicial conduct of both the prosecutor and the judge, and convicted without evidence upon a fatally defective indictment. Unless the supervisory power of this Court is exercised, a precedent will have been confirmed for lawlessness in the guise of criminal justice.

Moreover, the protection of public officers from persecution is of just as much public importance as the punishment of those who abuse public trust—for otherwise public officers must inevitably be stultified by fear and deterred from effectual service. The public interest is, therefore, doubly involved in this case—that, in a democracy, criminal justice shall be fair, regular, and in accord with the law of the land; and that the officials of the state shall be protected in their persons to the same extent as other citizens.

Wherefore, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

HOMER CUMMINGS,
WILLIAM D. DONNELLY,
Counsel for Petitioner.

February, 1941.

APPENDIX.

U. S. C., Title 18, sec. 88 (Criminal Code, sec. 37):

Conspiring to commit offense against United States. If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

U. S. C., Title 18, sec. 91 (Criminal Code, sec. 39):

Bribery of United States officer. Whoever shall promise, offer, or give, or cause or procure to be promised, offered, or given, any money or other thing of value, or shall make or tender any contract, undertaking, obligation, gratuity, or security for the payment of money, or for the delivery or conveyance of anything of value, to any officer of the United States, or to any person acting for or on behalf of the United States in any official function, under or by authority of any department or office of the Government thereof, or to any officer or person acting for or on behalf of either House of Congress, or of any committee of either House, or both Houses thereof, with intent to influence his decision or action on any question, matter, cause, or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, or with intent to influence him to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States, or to induce him to do or omit to do any act in violation of his lawful duty, shall be fined not more than three times the amount of money or value of the thing so offered, promised, given, made, or tendered, or caused or procured to be so offered, promised, given, made, or tendered, and imprisoned not more than three years.

U. S. C., Title 28, sec. 411 (Judicial Code, sec. 275):

Jurors; qualifications and exemptions. Jurors to serve in the courts of the United States, in each State respectively, shall have the same qualifications, subject to the provisions hereinafter contained, and be entitled to the same exemptions, as jurors of the highest court of law in such State may have and be entitled to at the time when such jurors for service in the courts of the United States are summoned.

U. S. C., Title 28, sec. 412 (Judicial Code, sec. 276):

Same; manner of drawing. All such jurors, grand and petit, including those summoned during the session of the court, shall be publicly drawn from a box containing, at the time of each drawing, the names of not less than three hundred persons, possessing the qualifications prescribed in the section last preceding, which names shall have been placed therein by the clerk of such court, or a duly qualified deputy clerk, and a commissioner, to be appointed by the judge thereof, or by the judge senior in commission in districts having more than one judge, which commissioner shall be a citizen of good standing, residing in the district in which such court is held, and a well-known member of the principal political party in the district in which the court is held opposing that to which the clerk, or a duly qualified deputy clerk then acting, may belong, the clerk, or a duly qualified deputy clerk, and said commissioner each to place one name in said box alternately, without reference to party affiliations until the whole number required shall be placed therein.

Illinois Rev. Stats. (1939), c. 78, sec. 1:

The county board of each county shall at or before the time of its meeting, in September, in each year, or at any time thereafter, when necessary for the purpose of this Act, make a list of sufficient number, not less than one-tenth of the legal voters of each sex of each town or precinct in the county, giving the place of residence of each name on the list, to be known as a jury list.